In The

Supreme Court of the United States

October Term, 1973

No. 73-705

MAJOR FRED R. ROSS AND
STATE OF NORTH CAROLINA,
Petitioners,

v.

CLAUDE FRANKLIN MOFFITT,
Respondent.

MAJOR FRED R. ROSS AND
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Petitioners,

v.

CLAUDE F. MOFFITT,
Respondent.

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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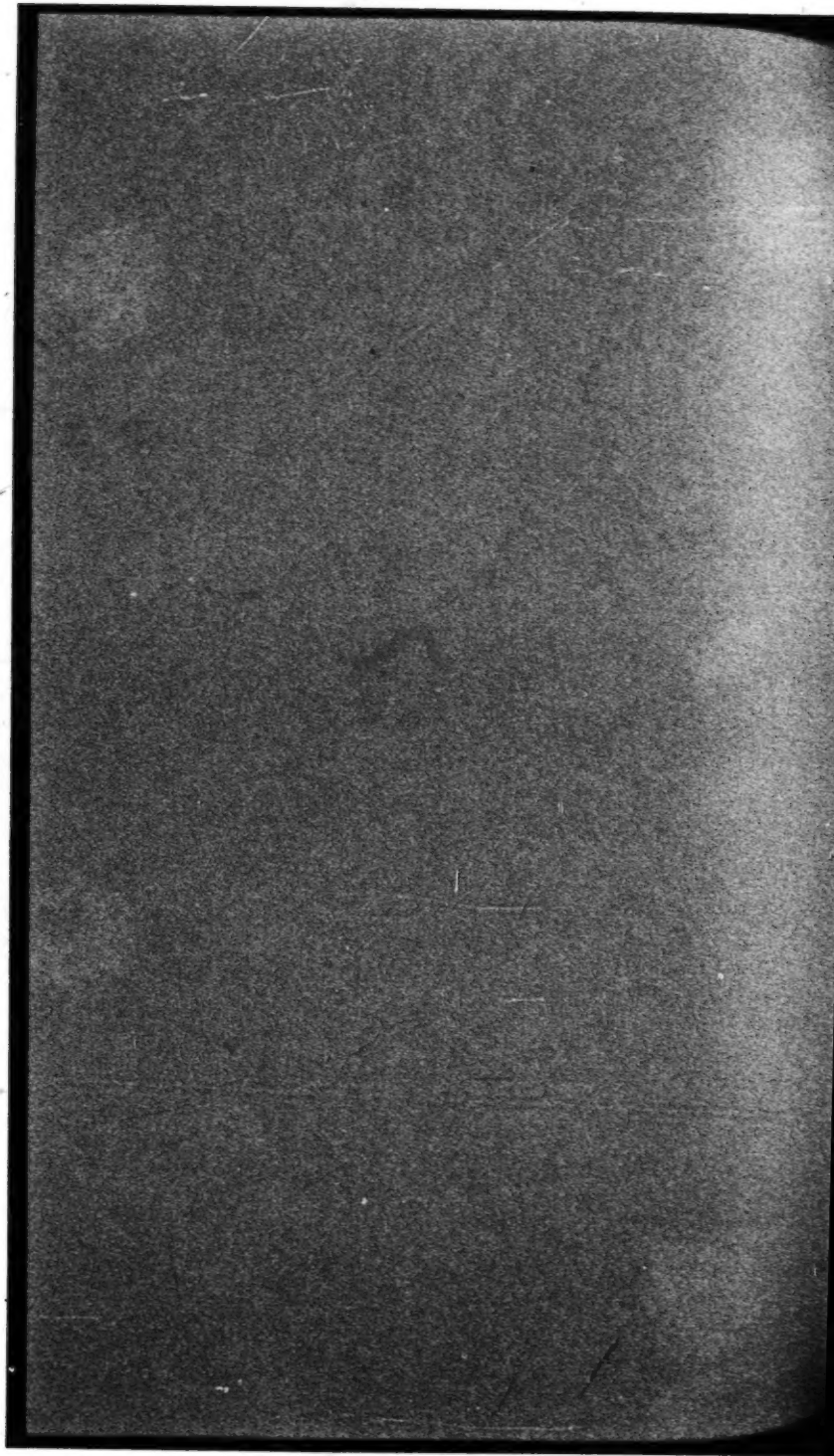

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BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF AMICUS CURIAE

The Petition for a Writ of Certiorari in this case was docketed in this Honorable Court on November 15, 1973, and the opinion of the United States Courts of Appeals for the Fourth Circuit may be found in *Moffitt* v. *Ross,* 483

F.2d 650 (4th Cir. 1973). The Petition for a Writ of Certiorari was granted by order of this Court dated January 7, 1974.

The decision of the United States Court of Appeals for the Fourth Circuit in Case No. 72-1720, which was the case in the Court below dealing with the collateral attack by way of a Petition for a Writ of Habeas Corpus on a conviction in Guilford County, North Carolina, is of particular concern to the Commonwealth of Virginia because the affirmance of the holding of the Court of Appeals in that case would require Virginia, through its Supreme Court, to appoint counsel to assist a criminal defendant in petitioning this Honorable Court for a Writ of Certiorari if a federal question appropriate for review in this Court were raised. The holding of the Court of Appeals in the other case, Case No. 72-2480, is of only tangential interest to the Commonwealth of Virginia because it requires North Carolina to provide appellate counsel, not only for an appeal as of right to the intermediate Court of Appeals, but also for a discretionary appeal to the Supreme Court of North Carolina. As the Court of Appeals points out, Virginia's appellate process consists of a single stage with discretionary acceptance of review at that stage but Virginia provides counsel for that appeal. Consequently, Virginia's principal concern is with the holding in Case No. 72-1720, but that concern is a very real one as Virginia does not now provide counsel to assist defendants in seeking review before this Honorable Court, nor does Virginia have any existing statutory or administrative framework for so appointing and compensating counsel.

Perhaps one barometer as to the possible impact of the Fourth Circuit Court of Appeals' ruling on Virginia, and this Honorable Court, would be the impact that the prior holding of the United States Court of Appeals for the

Fourth Circuit in *Nelson* v. *Peyton*, 415 F.2d 1154 (4th Cir. 1969), had on the Commonwealth of Virginia. In that case the Court of Appeals held that at the close of a criminal trial there was an affirmative obligation on either the trial court or counsel to *sua sponte* advise the defendant of his right to appeal, a procedure that had not theretofore been followed in Virginia. In the three years preceding the decision in *Nelson*, a total of 1,092 writs of error were either granted or refused in criminal cases by the Supreme Court of Virginia—an average of 364 cases a year. In the comparable three year span following the decision in *Nelson*, 1970-1972, a total of 1,906 writs of error were acted upon by the Supreme Court of Virginia—an average of 635 cases per year. This is a remarkable and striking increase that cannot be totally attributed to the normal increase in criminal prosecutions.

An additional concern on the part of the amicus curiae is the probable impact of providing counsel for the seeking of review in this Honorable Court and, in light of the holding in *Nelson*, the probable obligation on appellate counsel to advise his client of his further appellate rights after review has been refused by the Supreme Court of Virginia, and in a case where review has been granted and the ultimate disposition has been unfavorable for the defendant, a similar obligation of advice will fall on appellate counsel in those cases. There will obviously be a material increase in the number of Petitions for Writs of Certiorari filed in this Court from around the country, and prosecutor's staffs or Attorneys General's staffs will be responsible for preparing, reproducing and filing Briefs in Opposition to the Granting of a Writ of Certiorari or Motions to Dismiss or Affirm in direct appeal cases filed in this Court. There will thus be a substantial increase in the workload, for example, of the Criminal Litigation Division of the Office of the At-

torney General of Virginia, and this increase would come at a time when the emphasis in that office has shifted towards providing greater technical support to local law enforcement and prosecutorial officials so as to improve the administration of the criminal justice system.

In addition, there will be a corresponding increase in post-conviction collateral proceedings where prisoners raise allegations relating to the denial of appeal or ineffectiveness of counsel for the alleged failure of their attorneys to advise them of their appellate rights or to pursue those rights. A significant number of these proceedings would necessitate plenary hearings as the allegations relate to matters that are outside the record and, significantly, unless this Honorable Court were to provide some mechanism for the late filing of Petitions for Writs of Certiorari in such cases that are decided in favor of the prisoner, the prisoner may be entitled to his release or to a re-trial on a Writ of Habeas Corpus although the alleged appellate deficit obviously had no direct impact on guilt or innocence or the fairness of the initial trial, and despite the fact that the court of last resort in the State had ruled that the prisoner had a fair trial.

Lastly, but not least, the amicus curiae, like all those properly concerned with the effective and efficient disposition of cases in this Honorable Court, is disturbed by the probable impact of the Court of Appeals' decision on the caseload of this Honorable Court. As Chief Justice Burger pointed out in his annual report on the state of the Federal Judicial Branch to the American Bar Association, the number of docketed cases before this Court increased from 1,463 in 1953 to 4,640 in 1972 (Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1129 (1973)). The *Report of the Study Group on the Caseload of the Supreme Court*, often referred to as the "Freund Re-

port," also points to this geometric increase in the caseload of this Honorable Court and that report points to the fact that from 1941 to 1971 the number of *in forma pauperis* cases filed in this Court increased from 178 to 1,930 (57 F.R.D. 573, 579). From 1941 to 1971 the percentage of *in forma pauperis* petitions granted dropped from 9 percent to 3.3 percent, with the latter figure adjusted to exclude the petitions granted in the death penalty cases (57 F.R.D. at 580, 615). The Freund Study Group reached the following conclusions based on these impressive statistics:

> "The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.
>
> "Over the past thirty-five years, as has been seen, the number of cases filed has grown about fourfold, while the number of cases in which the Court has heard oral argument before decision has remained substantially constant. Two consequences can be inferred. Issues that would have been decided on the merits a generation ago are passed over by the Court today; and, second, the consideration given to the cases actually decided on the merits is compromised by the pressures of 'processing' the inflated docket of petitions and appeals.
>
> * * *
>
> "We are concerned that the Court is now at the saturation point, if not actually overwhelmed. If trends continue, as there is every reason to believe they will, and if no relief is provided, the function of the Court must necessarily change. In one way or another, plac-

> ing ever more reliance on an augmented staff, the Court could perhaps manage to administer its docket. But it will be unable adequately to meet its essential responsibilities." (57 F.R.D. at 581, 584).

If the decision of the United States Court of Appeals for the Fourth Circuit is allowed to stand in an unmodified form, the figures mentioned above would be extremely conservative and the inundation of this Court described by the Freund Study Group would be complete.

Accordingly, the Commonwealth of Virginia, joined by the State of California, with the sponsorship of their Attorneys General, offer this brief in support of the petitioner's argument that counsel should not be provided as a constitutional right to assist state prisoners in seeking review of state appellate court determinations in this Honorable Court. This brief of amicus curiae will be limited to the consideration of that issue—*the provision of counsel for the perfection of a Petition for a Writ of Certiorari after final action in the State appellate courts*—the issue involved in Case No. 72-1720 in the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED

I. Whether, as a constitutional right, a State must provide counsel at every stage in the appellate process from a criminal conviction, including the seeking of review in the Supreme Court of the United States?

II. Whether, if this Honorable Court feels that the first question should be answered in the affirmative, some modification of the prior holdings of this court should be made so as to require the seeking of certiorari, as a necessary element in the exhaustion of State remedies within the meaning of 28 U.S.C. § 2254 or so as to provide that the

denial of certiorari by this Honorable Court to a State prisoner constitutes an adjudication by this Court that the prisoner is not "in custody in violation of the Constitution or laws or treaties of the United States" so as to preclude Federal habeas corpus under 28 U.S.C. § 2241?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the Constitution of the United States:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 United States Code § 2241:

(a) Writs of habeas corpus may be granted by the

Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the

district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 United States Code § 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written

opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in

paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

The specific facts which gave rise to this action are fully set out in the Brief for the Petitioner and the amicus will accordingly not repeat those matters but will concentrate instead during the course of this brief on the broader national impact of the Court's decision in this case.

ARGUMENT

I.

The United States Court Of Appeals For The Fourth Circuit Erred In This Case In Ruling That A State Must, As A Constitutional Right, Provide Counsel At Every Stage In The Appellate Process From A Criminal Conviction, Including The Discretionary Portion Of A Two-Tier Appellate System And For The Seeking Of Review In This Honorable Court.

The United States Court of Appeals for the Fourth Circuit prefaced its decision in these cases by acknowledging that they were "met with the questions reserved by the Court in *Douglas* v. *California,* 372 U.S. 353" (483 F.2d at 650). The Court below then proceeded to decide those "questions reserved" in such a manner as to have a decided impact on the administration of the appellate portion of the criminal justice system. As previously pointed out, the Commonwealth of Virginia has no specific concern with the decision of the Court of Appeals in Case No. 72-2480 as Virginia has, at the present time, a single tier appellate system and counsel are provided for indigent criminal defendants at all stages in that process (483 F.2d at 653-654).

However, Virginia presently has no procedure for requiring advice to unsuccessful criminal defendants in State appeals that they have a right to seek further review in this Honorable Court, nor does Virginia have any existing process whereby counsel would be provided to assist indigent defendants in seeking such review if the defendant wishes to avail himself of this opportunity. Consequently, the decision of the Court of Appeals with regard to this latter point is of great concern to the amicus curiae.

The Court below acknowledges that the Seventh and Tenth Circuit Courts of Appeals, in *United States ex rel Pennington* v. *Pate,* 409 F.2d 757 (7th Cir. 1969) and *Peters* v. *Cox,* 341 F.2d 575 (10th Cir. 1965), had held to

the contrary but the Court below felt that these decisions in 1969 and 1965, respectively, were essentially outdated within the context of what was now "constitutionally requisite" (483 F.2d at 655). In *Peters,* the United States Court of Appeals for the Tenth Circuit held as follows:

> "The question presented in this habeas corpus appeal is whether the Supreme Court of New Mexico denied appellate's constitutional rights by refusing and failing to appoint counsel to assist him in taking an appeal in a criminal case from that court to the Supreme Court of the United States. We hold that there has been no denial of constitutional rights under the circumstances of this case.
>
> "It is, of course, the law that the due process clause of the Fourteenth Amendment to the Constitution requires the appointment of counsel to represent an indigent defendant in a state criminal trial. *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Hickock* v. *Crouse,* 10 Cir., 334 F.2d 95. It is also the law that under the due process and equal protection clauses of the Fourteenth Amendment, an indigent defendant has a right to appointed counsel on the appeal of a state criminal conviction. *Douglas* v. *People of California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811. But, we have been cited to no authority requiring, or even permitting, a state supreme court to appoint counsel for an indigent defendant to represent him on his appeal to the Supreme Court of the United States. Our own research has revealed none. The judgment below is therefore affirmed." (341 F.2d at 575).

Similarly, although the United States Court of Appeals for the Seventh Circuit was primarily concerned with the question decided by the Court below in Case No. 72-2480, the Court in *Pennington* partially based its determination on the practices of this Honorable Court in Petitions for Writs of Certiorari:

> "We find support for our decision in the present practices of the United States Supreme Court with regard to petitions for writs of certiorari. The United States Supreme Court's disposition of a petition for a writ of certiorari is as fully discretionary as the Illinois Supreme Court's decision to grant a Rule 315 appeal. Both determinations are made after one appeal as of right has occurred. If we were to hold for the petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." (409 F.2d at 760).

The dissenting justices in the case of *Douglas* v. *California*, 372 U.S. 353 (1963), similarly relied on the practices of this Honorable Court. Mr. Justice Clark, in dissenting, made the following statement:

> "With this new fetish for indigency the Court piles an intolerable burden on the state's judicial machinery. Indeed, if the Court is correct it may be that we should first clean up our own house. We have afforded indigent litigants much less protection than has California. Last Term we received over 1,200 in forma pauperis applications in none of which had we appointed attorneys or required a record. Some were appeals of right. Still we denied the petitions or dismissed the appeals on the moving papers alone. At the same time we had hundreds of paid cases in which we permitted petitions or appeals to be filed with not only records but briefs by counsel, after which they were disposed of in due course. . . ." (372 U.S. at 359).

The dissenting opinion of Mr. Justice Harlan, joined by Mr. Justice Stewart, similarly alluded to the practices of this Honorable Court:

> "What the Court finds constitutionally offensive in

California's procedure bears a striking resemblance to the rules of this Court and many state courts of last resort on petitions for certiorari or for leave to appeal filed by indigent defendants pro se. Under the practice of this Court, only if it appears from the petition for certiorari that a case merits review is leave to proceed in forma pauperis granted, the case transferred to the Appellate Docket, and counsel appointed. Since our review is generally discretionary, and since we are often not even given the benefit of a record in the proceedings below, the disadvantages to the indigent petitioner might be regarded as more substantial than in California. But as conscientiously committed as this Court is to the great principle of 'Equal Justice Under Law,' it has never deemed itself constitutionally required to appoint counsel to assist in the preparation of each of the more than 1,000 pro se petitions for certiorari currently being filed each Term. We should know from our own experience that appellate courts generally go out of their way to give fair consideration to those who are unrepresented." (372 U.S. at 365-366).

This Honorable Court's practice has been described in Stern & Gressman, *Supreme Court Practice* § 11.2 (4th Ed. 1969), as follows:

> *"No appointment of counsel before grant of review.* The Court has steadfastly refused to appoint counsel to assist an unrepresented indigent, prior to the grant of review, in preparing a petition for certiorari or jurisdictional statement or any other preliminary motion or document. Requests for counsel at such early stages have uniformly been rejected through the Clerk, acting on instructions from the Court. While the correctness and indeed the constitutionality of this refusal to appoint counsel to prepare the documents at this critical stage of Supreme Court litigation have been questioned, at least with respect to the direct review of criminal prosecutions, there is no indication as yet that

> the Court will change its policy in this respect." (Id. at 378; fn. omitted; see also 1A *West's Federal Forms*, § 488 (Boskey Ed. 1969); Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 796-799 (1961).)

Stern and Gressman have pointed to the obvious practical problems involved in appointing counsel to assist in the preparation of an in forma pauperis certiorari proceeding. They point out:

> "Many of the *in forma pauperis* cases are completely without merit, but the Court would have no way of determining at this point which ones are of sufficient merit or difficulty to warrant the attention or assistance of counsel. Many of the requests might come so near the filing deadlines as to compel further delays in processing the cases in order to give counsel more time to study the case and prepare the necessary papers. And the sheer number of likely requests for counsel would soon create problems in selecting sufficient numbers of qualified counsel. Selection of counsel after a case has been studied and review has been granted, on the other hand, can be premised in part upon the counsel's expertise in the area of law involved." (Stern and Gressman at 378, fn. 15).

At the October Term, 1962, this Honorable Court dealt with a group of seven motions for appointment of counsel which directly presented this question to the court and yet in all seven cases this Honorable Court merely denied the motion (*Drumm* v. *California*, 373 U.S. 947 (1963); *Mooney* v. *New York*, 373 U.S. 947 (1963); *Womack* v. *Oregon*, 373 U.S. 947 (1963); *In re Jacobs*, 373 U.S. 947 (1963); *In re Diaz*, 373 U.S. 947 (1963); *In re Turner*, 373 U.S. 947 (1963); *Oppenheimer* v. *California*, 374 U.S. 819 (1963)). The index to the *Supreme Court Journal* for that Term records the fact that "at this time Clerk was

directed to follow policy of advising litigants that the Court would not appoint counsel to assist indigent litigants in preparing petitions for certiorari." (*Supreme Court Journal, October Term, 1962,* Index, p. iv.).

It is respectfully submitted that this Honorable Court should continue to adhere to its consistent practice and refuse to extend the Sixth Amendment right to counsel to the preparation of Petitions for Writs of Certiorari in this Honorable Court.

II.

If This Honorable Court Determines That The Sixth and Fourteenth Amendments To The Constitution Of The United States Mandate The Provision Of Counsel To Assist Indigent State Prisoners In Perfecting Review Of Their Convictions By This Court, Your Honors Should Also Reconsider The Weight And Effect That Such A Review Will Have On The Finality Of Criminal Proceedings By Holding That The Denial Of Certiorari Constitutes A Determination That The Prisoner Is Not In Custody In Violation Of Federal Constitutional Law So As To Preclude Federal Habeas Corpus Relief Or, At The Very Least, Reconsider The Court's Holding In Fay v. Noia, 372 U.S. 391, 435 (1963), That A State Prisoner Need Not Seek Certiorari In Order To Have Fully Exhausted His Available State Court Remedies.

If this Honorable Court determines that application for certiorari is such an indispensable and crucial stage of the criminal proceedings that the Sixth and Fourteenth Amendments to the Constitution of the United States mandate the appointment of counsel to assist an indigent defendant in perfecting a review by this Honorable Court, then your Honors should reconsider the weight to be given a denial of certiorari for the purpose of collateral, post-conviction proceedings, especially in the Federal courts.

This Honorable Court has rather consistently stated that the denial of certiorari is not to be construed as reflecting

the Court's views either as to the merits of the case or as to the Court's jurisdiction to hear the matter (Stern and Gressman, *supra*, § 5.7). Your Honors have frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times." (*United States* v. *Carver*, 260 U.S. 482, 490 (1923). See also *Brown* v. *Allen*, 344 U.S. 443, 451-452, 491-492 (1953); *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959).) Mr. Justice Frankfurter was particularly persistent in commenting that the Court's refusal to grant certiorari was of no significance insofar as the issues before the Court were concerned (See *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-920 (1950); *Agoston* v. *Pennsylvania*, 340 U.S. 844 (1950); *Rosenberg* v. *United States*, 344 U.S. 889 (1952); *Sheppard* v. *Ohio*, 352 U.S. 910, 911 (1956); See also Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 547 (1958), Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Ass'n. Q. 393, 402-403 (1960)).

In *Brown* v. *Allen*, 344 U.S. 443 (1953), Mr. Justice Jackson expressed some views that might make an affirmance of the Court of Appeals' decision in this case meaningful if the Court decides to so venture. Mr. Justice Jackson said:

> "My conclusion is that whether or not this Court has denied certiorari from a State court's judgment in a habeas corpus proceeding, no lower Federal court should entertain a petition except on the following conditions: (1) That the petition raises a jurisdictional question involving Federal law on which the State law allowed no access to its courts, either by habeas corpus or appeal from the conviction, and that he therefore has no state remedy; or (2) that the petition shows that although the law allows a remedy, he was actually and properly obstructed from making a record

upon which the question could be presented, so that his remedy by way of ultimate application to this Court for certiorari has been frustrated. There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the run-of-the-mill case certainly does not." (344 U.S. at 545).

Mr. Justice Jackson also stated:

"I agree that as stare decisis, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But, for the same case in which certiorari is denied, its minimum meaning is that this court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by State or Federal courts. . . ." (344 U.S. at 543).

In the course of the same decision, Mr. Justice Reed speaking for himself and Chief Justice Vinson and Justice Minton, said:

"A. *Effect of Denial of Certiorari.*—In cases such as these, a minority of this Court is of the opinion that there is no reason why a district court should not give consideration to the record of the prior certiorari in this court and such weight to our denial as the District Court feels the record justifies. This is the view of the Court of Appeals [Citations omitted.] This is, we think, the teaching of *Ex parte Hawk*, 321 U.S. 114, 118, and *White* v. *Ragen*, 324 U.S. 764, 765. We have frequently said that the denial of certiorari 'imports no expression of opinion upon the merits of a case.' [Citations omitted.] When on review of proceedings no res judicata or precedential effect follows, the result would be in accord with that expression, that statement is satisfied. But denial of certiorari marks

> final action on State criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in *Dorsey* v. *Gill*, 80 App. D.C. 9, 148 F.2d 857, See F.R.D. 313, the denial would make the issues res judicata. The minority thinks that where a record distinctly presenting a substantial Federal constitutional question disentangled from problems of procedure is brought here by certiorari and denied, courts dealing with the petitioner's future applications for habeas corpus on the same issues presented in earlier applications for writs of certiorari to this Court, should have the power to take the denial into consideration in determining their action. . . ." (344 U.S. at 456).

Thus, if this Honorable Court is to accord greater significance to certiorari by requiring the appointment of counsel to assist an indigent defendant in preparing a Petition for a Writ of Certiorari to this Court, then the denial of certiorari should have the same effect as to that particular case as would the dismissal of an appeal for want of a "substantial Federal question." (See *Epton* v. *New York*, 390 U.S. 29 (1968); *United States ex rel. Epton* v. *Nenna*, 318 F.Supp. 899, 906-909 (S.D.N.Y. 1970), aff'd 446 F.2d 363, 365, 366 (2nd Cir. 1971), cert. den. 404 U.S. 948 (1971)). Incidentally, it is interesting to note the extent to which the denial of certiorari is alluded to in citations of cases in both legal periodicals and in the opinions of this and other courts. It is also interesting to note the increasing tendency to write dissenting opinions, sometimes of considerable length, from orders of this Court denying certiorari. If the denial of certiorari is of no significance, then why should dissents be noted and why should that fact be alluded to in a case citation? (See *Simmons* v. *Union News Co.*, 382 U.S. 884, 886 (1965).)

This approach would allow for the criminal defendant to have a full and complete consideration of his case at all levels while at the same time insuring a higher degree of finality to criminal judgments (See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 Univ. Chi. L. Rev. 142 (1970); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966)).

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia, joined by the State of California, as amicus curiae on behalf of the petitioner herein, respectfully requests this Honorable Court to reverse the decision of the Court of Appeals and remand the case to the United States Court of Appeals for the Fourth Circuit with directions to vacate its opinion and to remand the cases to the District Courts with instruction to dismiss the petitions for writs of habeas corpus.

Respectfully submitted,

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The Commonwealth of Virginia has been authorized by the Honorable Evelle J. Younger, Attorney General of the State of California, to list him as joining with us in our Amicus Curiae brief.

CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., an Assistant Attorney General of Virginia, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the 21st day of February, 1974, I mailed copies of the foregoing brief of Amicus Curiae in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by first class mail to the Honorable Robert Morgan, Attorney General of North Carolina, P. O. Box 629, Raleigh, North Carolina, 27602, Counsel for Petitioners, and to Thomas B. Anderson, Jr., Esquire, Loflin, Anderson, and Loflin, 119 Orange Street, P. O. Box 1315, Durham, North Carolina 27702, of counsel for respondent.

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